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No. 88-1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*

v.

JAMES M. LOVE, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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1. Normally the Government's briefs to this Court sound with the sweet music of legal reason. That is not so of the Federal respondent's brief in opposition here; its dissonance reveals the unresolved tension between two discordant voices.

The dominant voice is that of the Justice Department and it shows a blithe, and most unbecoming, disregard for effective enforcement of the Federal environmental laws according to their terms, and for public health and safety. Subordinated in the background is the dying echo of the Environmental Protection Agency's ("EPA")[1] concern

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[1] The EPA is, in theory, the Justice Department's client and, in fact, the Agency designated by Congress to administer FIFRA.

that the decision below is not simply wrong, but wrong in a way that undermines EPA's long-term ability to meet public health emergencies.

As one would expect, and as we now show, the result is that the Government's attempt to develop its theme that the *certiorari* petition here should be denied does not ring true.

1. In contrast to the private respondents (hereafter, for simplicity's sake, "Love"),[2] the Government agrees that

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[2] On the merits, Love defends the Ninth Circuit decision primarily by answering a different question than the one that is in fact involved in this case: Love labors to prove that the statute generally permits review of emergency suspension orders (e.g., Response to a Petition for a Writ of Certiorari ("Response") at 12, 17-18, 23-24); but there is no dispute that where suspension proceedings are pending before the agency, emergency suspension orders *are* reviewable in court. Rather, the issue here is whether emergency suspension orders *remain* reviewable although available administrative proceedings for considering the propriety of those orders are not used. Love offers no explanation why Congress would wish to provide special review proceedings for emergency suspension orders even *after* there has been notice and an apportunity for an agency hearing with regard to such orders, and the distinction between emergency and ordinary suspension orders therefore no longer exists.

Love also suggests that petitioners lack standing to file a petition for writ of certiorari. Response at 9-12. However, as Love indicates, at least one of the individual and two of the organizational plaintiffs do represent the interests of applicators on the crops and in the area involved in this case. Response at 11-12. Moreover, the EPA order banning dinoseb relied in large part on harm to farmworkers other than applicators and their families. Decision and Emergency Order Suspending the Registrations of all Pesticide Products Containing Dinoseb, 51 Fed. Reg. 36,634, 36,643 (there is a substantial risk of birth defects in the offspring of workers exposed to dinoseb through drift of the spray, exposure on reentry to the fields after spraying, and exposure to residues on equipment or clothing.)

We note finally that Love misleads the Court in indicating that review was sought in district court as soon as reconsideration of the suspension order with regard to the crops involved in this case

the decision below constitutes "manifest error," is "implausible" and "failed to identify any coherent legislative purpose that could explain its construction." Brief for the Federal Respondent in Opposition ("Gov. Br.") at 13. Moreover, although it uses carefully-guarded and somewhat opaque language (some of which we set out in the margin), in the end the Government agrees as well with the certiorari petion's assertion that a result of the decision of the Ninth Circuit in this case will be, at a minimum, "to *inhibit* the [Environmental Protection] Agency from using its emergency powers" to remove pesticides from the market. Petition for a Writ of Certiorari ("Cert. Pet.") at 26 (emphasis supplied).[3]

The Government nonetheless opposes certiorari, giving as its primary justification that it is not *certain* that EPA will *always* be deterred in the future from issuing emergency orders where there are in fact health emer-

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was denied. First, EPA had not yet acted at all on the modification request with regard to several of the crops involved in this case at the time review was sought in district court. *See* Gov. Br. at 6 n.4. Second, the modification process under 40 C.F.R. Pt. 164, Subpt. D is a separate administrative proceeding; Love did not seek in district court to review EPA's handling of the limited modification request, but rather to overturn the original suspension order in its entirety. *See* Gov. Br. at 4, n.4; 6, n.4.

[3] The Government acknowledges, for example, that "this decision may be a factor in its deliberations when [EPA] weighs the advisability of emergency action in the future." Gov. Br. at 14. In particular, "the Agency may decide that a case presenting particularly difficult scientific issues is best adjudicated in a single administrative forum . . . rather than a multiplicity of district courts." And, "[t]he agency may also be concerned about its practical ability to administer and enforce an emergency order in a context in which interested parties are likely to use judicial review in order to prevent finality and create uncertainty." Gov. Br. at 14. Thus, it is possible that "the decision would sometimes have a chilling effect on the agency's willingness to issue an emergency order." Gov. Br. at 15; *see* Cert. Pet. at 26 (referring to "the chilling effect [of the decision] on the use of EPA's power to prevent an imminent health hazard.")

gencies; thus, future judicial review of the issue presented in this case will not be "automatically" precluded. Gov. Br. at 14.[4]

Put in plain English, that justification comes down to the proposition that a patently erroneous court of appeals' decision that may well deter the Government from protecting against public health emergencies as directed by Congress—where (a) there is no prospect of court intervention in any future case in which such deterrence does occur;[5] and (b) there is the possibility, although not the certainty, that the effect of this deterrence will be to eliminate *any* later opportunity for this Court to review the jurisdictional issue—is *not* a matter of sufficient importance to merit the exercise of this Court's *certiorari* jurisdiction.

Under some statutory schemes, a concern with preserving judicial resources where there is no certainty that a novel decision will have a uniform negative impact might be well taken. In this instance, however, *the issue is one that only arises if a government agency first determines that there is a danger to the public health so grave as to constitute an emergency.* In this context, the prospect that the public health could be endangered, in one or more future instances, *without any possibility of correction by the courts*, because of a "manifest error" by the court of appeals in this case fully justifies—and we submit urgently requires—this Court's review.

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[4] *See id.* (emphasis supplied) ("the effect of this decision will not *necessarily* be controlling"); *id.* at 15 (emphasis supplied) ("the effect [of the decision] will not be uniform or pervasive, nor will it operate *automatically* to foreclose future review.")

[5] The public is unlikely to be aware of the degree to which the result below was a factor in declining to issue an emergency order in a particular instance. Moreover, the statute does not in any event provide for review of a *refusal* to issue an emergency order. 7 U.S.C. § 136d(c)(4).

2. Since the *certiorari* petition was filed, an event has occurred which is so plainly relevant to our request for review that we feel duty-bound to advise the Court even though we are not certain of its legal ramifications: As we indicated in the petition, EPA has now issued a final cancellation of dinoseb, the pesticide involved in this case. Cert. Pet. at 9 n.7. In two cases concerning the validity of that final order which were pending in the Ninth Circuit at the time the petition was filed, that court, on March 20, 1989, days after oral argument, issued an order upholding the cancellation, with opinion to follow. *Northwest Food Processors Ass'n v. Reilly*, Nos. 88-4339, 88-4389 (9th Cir. Mar. 20, 1989). *See* Gov. Br. at 5 n.3. This case is not technically moot as a result of the Ninth Circuit's recent decision. *See* Gov. Br. at 5 n.3. It is quite likely, however, that the case will become moot within the next several months.[6]

While we are aware of no doctrine of prospective mootness, we do suggest that, under these circumstances, it might be appropriate for this Court to hold the petition for certiorari pending the termination of the litigation concerning the cancellation order. If, as appears likely, the result of that litigation is to render this case moot, this Court should then grant *certiorari* and vacate the

[6] The reason is that as of this moment, dinoseb has been finally cancelled by EPA. Since the suspension order here at issue was in effect only pending the cancellation order, the propriety of the suspension order, presents no live issue right now. Unless the Ninth Circuit, sitting en banc, overturns the March 20 decision of the Ninth Circuit panel, or this Court grants *certiorari* on the question of the propriety of the cancellation, the question whether the suspension order is proper will be moot. Given that the same district court that overturned the suspension order approved the final cancellation (Cert. Pet. at 10 n.7), and that the Ninth Circuit panel felt that the validity of the cancellation order was sufficiently clear that the panel could issue an order without opinion days after oral argument approving the cancellation order, it seems extremely unlikely that the challenges to the cancellation order will ultimately succeed.

decision below, remanding to the court of appeals with directions to dismiss the case on grounds of mootness. *United States v. Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950); *Deakins v. Monaghan*, —— U.S. ——, ——, 108 S. Ct. 523 (1988); *see also, e.g., Chicago Board Options Exchange, Inc. v. Board of Trade of the City of Chicago*, 459 U.S. 1026 (1982). The result of that approach will be substantially to eliminate the decision below as a deterrent to any future EPA decisions with regard to emergency suspension orders, while precluding any need for this Court to decide on the merits the jurisdictional issue determined by the court of appeals.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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